Hospital Penang for one year in surgery and anaesthesia. After that he was medical officer-in-charge of outpatients and officials and prisons in Penang. When in Penang he did anaesthesia under Dr. L. P. Scott and surgery under Mr. Alhady. He went to the United Kingdom and took his primary surgical F.R.C.S. in May 1961. He became a Fellow of the Faculty of Anaesthetics in the Royal College of Surgeons (F.F.A.R.C.S.) in 1962. When he came back he was again posted to the Penang General Hospital as a consultant anaesthetist until February 1965. In March 1965 he was transferred to the General Hospital, Kuala Lumpur and worked in Mr. Alhady's surgical unit, and it was quite common for Mr. Alhady to allow him to do endoscopic examinations.

It was put to him in cross-examination that endoscopic examination is not the work of an anaesthetist. In answer he said that the whole concept of modern anaesthetist is not only seeing the patient before and after the operation but he might be called upon to work in intensive care units and various diagnostic procedures such as passing catheters, performing endoscopic duties etc. He said that during his training in the United Kingdom he was taught to perform various endoscopic duties including sigmoidoscopy. In my view sigmoidoscopy does not involve utilisation of a new advance in technique which carries with it wholly unforeseen dangers and difficulties. It is being carried out every day as a pre-operative examination for piles surgery. Every houseman is trained to do sigmoidoscopy and any doctor with the minimum basic training is taught to use endoscopic instruments. Sigmoidoscopy has been accepted as a relatively minor operation.

The anaesthetist had done hundreds of endoscopic examinations including sigmoidoscopy in Penang and in Kuala Lumpur and had encountered no trouble except this particular mishap which Mr. Alhady described as unfortunate because it turned out that the plaintiff has a bicernuate uterus which according to him might have been the cause of the slight perforation during the examination. According to him the possibility exists. There is evidence that the greatest care is required to ensure free passage when the instrument is introduced into the rectum and the procedure required a high degree of concentration. The anaesthetist said he exercised all the care and caution he possessed at the time and although he was showing the houseman the sigmoidoscopy, at no time he said did he lift his sight from the mirror.

Having regard to all the circumstances of this case I am satisfied that the anaesthetist was competent to do the sigmoidoscopic examination and he had exhibited competent care and skill on that particular occasion. This was an unfortunate incident which does occur, though rarely, in such cases even with the most skilled treatment as was exemplified by Mr. Alhady in a similar case which did occur in the United Kingdom. The proposition that the bicernuate uterus is a contributory factor is not without force as the possibility suggested cannot altogether be ruled out. I have every reason to sympathise with the plaintiff but sympathy alone is not sufficient to found a claim on negligence. I find as a fact that negligence has not been established. There will be no order as to costs.

Case dismissed.

Solicitors: *Skrine & Co.*

LIM GAIT TONG v. KUNG HEAN CHOW

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) July 3, 1970]

[Penang — Federal Court Civil Appeal No. X. 90 of 1969]

Bankruptcy — Notice — Substituted service — Failure to file copy of advertisement in newspaper at Registry, High Court — Whether this invalidates proceedings — Bankruptcy Rules, 1969, r. 17.

In this case the appellant appealed against a receiving and adjudication order made against him on the ground that the service of the bankruptcy notice on him was defective for failure to comply with the provisions of rule 17 of the Bankruptcy Rules, 1969. Service on the appellant had been effected by substituted service by advertisement in a local newspaper. It was alleged that a copy of the advertisement had not been filed at the Registry, High Court, as required by rule 17.

Held, dismissing the appeal: the failure to comply with rule 17 of the Bankruptcy Rules, 1969 was only a formal defect or irregularity, as it could not reasonably be said that the failure to file a copy of the advertisement had affected the service of the bankruptcy notice and the creditor's petition on the debtor.

Case referred to:-

(1) *Rengasamy Pillai* v. *Comptroller of Income Tax* [1970] 1 M.L.J. 233, P.C.

FEDERAL COURT.

R. Rajasingam for the appellant.

Jag-Jit Singh for the respondent.

Azmi L.P.: We dismissed the appeal with costs and as indicated then, I give my reasons now.

This is an appeal by the debtor against a receiving and an adjudication order made against him, on the ground that he had failed to comply with a bankruptcy notice. The notice was served on the debtor by substituted service effected by the posting of a sealed copy of the order of the court on a notice board of the court and on the front door of the last known place of residence of the debtor and by publication in a local newspaper, *The Straits Echo.* After the service in the manner mentioned above, the debtor filed an affidavit claiming that he had paid part of the amount claimed and that he intended to dispute the act of bankruptcy on the ground that the amount claimed to be due to him was incorrect and far in excess of what was actually due. In reply to that the creditor filed an affidavit in which he maintained that the sum claimed by him in the bankruptcy notice was the correct amount.

At the hearing of the petition the debtor failed to appear but sent a medical certificate to the effect that he was being treated for fever and cough. The learned judge refused to adjourn the matter and proceeded to deal with the petition and make the orders prayed for. In his judgment the learned judge stated that "if there were any valid grounds the court has power under section 92 to rescind or review the orders without an

appeal." The debtor instead of taking action as suggested in the judgment of the learned judge, filed a notice of appeal against the order of the High Court to this court.

He appealed only on one ground and it reads as follows: —

"That the service of the bankruptcy notice on the judgment debtor was defective in that the judgment creditor failed to comply with the mandatory provisions of rule 17 of the Bankruptcy Rules 1969 and such non-compliance by the judgment creditor is fatal."

In his argument before us counsel for the debtor informed us that on a search having been made at the Registry of the High Court it was found that a copy of the advertisement in the local paper had not been left by the person inserting it with the registry. That failure according to him, is fatal. He also pointed out to us that under rule 17, the registrar has to make a memorandum of the fact of filing the advertisement with him and that such memorandum shall be *prima facie* evidence that such advertisement had been duly inserted in the said newspaper. That failure to do so in his submission amounts to non-compliance of the mandatory provisions of rule 17 and therefore fatal to the petition.

We had already indicated to counsel for the bankrupt that we could have dismissed the appeal on the ground that the facts upon which he based his argument were not proved. Besides there could have been some explanation coming from the registrar why at the time when counsel alleged that a copy of the advertisement in the local paper was not found in the file of the registrar. We have also indicated that for the purpose of this judgment, we would accept that there has been a failure on the part of the creditor to file a copy of the advertisement. The question therefore we have to consider is whether such failure is fatal to the petition.

The judgment of the Privy Council in the case of *Rengasamy Pillai* v. *Comptroller of Income Tax*[1] was brought to our attention. The question decided by their Lordships in that case was different from the present one but there were certain passages in the judgment which in my view would be of assistance to me. Their Lordships referred to section 147(1) of the English Bankruptcy Act 1914 which corresponds substantially to our old section 131 of the Bankruptcy Ordinance 1959 and also to section 131 of the present Bankruptcy Act 1967.

It reads as follows: —

"No proceeding in bankruptcy shall be invalidated by any formal defect or by an irregularity, unless the court before which an objection is made to the proceedings is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court."

In the course of their judgment their Lordships of the Privy Council in the case I referred to said this: —

"But there is relevant authority upon the construction of the identical words in section 147(1) of the English Bankruptcy Act 1914. It is implicit in the section that proceedings in bankruptcy may be so defective as to render them a nullity notwithstanding that no substantial and irremedial injustice has in fact been caused by the defect. The section draws a distinction between such a defect and a "formal defect or irregularity". It is only the latter which are validated by the section, provided that no substantial and irremedial injustice has been caused."

In my view, the failure to comply with rule 17 is only a formal defect or irregularity. It cannot reasonably be said that the failure to file a copy of the advertisement has effected the service of the bankruptcy notice and the creditor's petition on the debtor.

Suffian and **Ali F.JJ.** concurred.

Appeal dismissed.

Solicitors: *R. Rajasingam & Co.; Jag Jit Singh & Co.*

KUNG AIK v. PUBLIC PROSECUTOR

[O.C.J. (Ong Hock Sim J.) July 3, 1970]

[Penang — Criminal Application No. 8 of 1970]

Constitutional Law — Citizenship — State Nationality Enactment — Citizenship by operation of law — Citizen by operation of law cannot be banished — Banishment Ordinance, 1959, s. 5(1) and (3) — Kedah Nationality Enactment 1371, (1952) — Federal Constitution, arts. 14 and 16.

This was an application to set aside an order of banishment made against the applicant. The applicant was born in Kedah and his mother held a certificate of citizenship of the Federation issued under article 16 of the Federal Constitution. Article 16 of the Federal Constitution entitles any person of or above the age of 18 years who was born in the Federation before *Merdeka Day* to be registered, upon application to the Federal Government, as a citizen, if he satisfies certain conditions set out therein. Under section 4(c) of the Kedah Nationality Enactment, 1371, "a person born before on or after the prescribed date in the State one of whose parents was born in the Federation of Malaya" is a subject of the Ruler by operation of law.

Held: as the applicant was born in Kedah and as it must be taken from the certificate of citizenship given to her that his mother was born in the Federation, the applicant was a citizen of the Federation by operation of law and therefore the order of banishment made against the applicant must be set aside.

Per Ong Hock Sim J.: "Having heard that this applicant was in custody with the shadow of a banishment order over his head since November 1966, (I have also learnt that he willingly granted a divorce to his wife so that she would not be left stranded and unprovided for, as he had entertained little hope of being released), I hope what I say here today will bring to the attention of the authorities dealing with banishment the primary duty to satisfy themselves of, and to make full inquiry into, the status of a person before taking action under the Banishment Ordinance."

CRIMINAL APPLICATION.

Triptipal Singh for the applicant.

Ajaib Singh (Senior Federal Counsel) for the Attorney-General.

Ong Hock Sim J. (delivering oral judgment): An order of banishment was made by the Minister of Home Affairs under section 5(1) of the Banishment Ordinance (No. 11 of 1959) against the applicant, Kung Aik @ Kung Seak Kiang. By the terms of subsection (3) of the same section, the applicant could apply within a period of fourteen days of the service of the banishment order on him to the High Court to set aside such